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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1978

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No. **78-503**

DALLAS KENT FRISBY,

*Petitioner*

v.

STATE OF WEST VIRGINIA,

*Respondent*

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**ON PETITION FOR A WRIT OF CERTIORARI  
To The Supreme Court of  
Appeals of West Virginia**

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**RESPONDENT'S BRIEF IN OPPOSITION**

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### RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of West Virginia, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Supreme Court of Appeals of West Virginia's opinion in this case. That opinion is unofficially reported in 245 S.E.2d 622.

Respondent accepts the preliminary statement and the statement on jurisdiction presented in petitioner's petition.

### QUESTION PRESENTED

Whether petitioner's detention by a city policeman while driving a motor vehicle bearing a license plate which appeared to carry *no* state designation was unreasonable for the purpose of investigating petitioner's driver's registration and license?

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the constitutional and statutory provisions cited by the petitioner but wishes to include West Virginia Code, Chapter 17A, Article 3, Section 2, cited by the Court below in its opinion. The statute is set forth in full herein in Appendix A, *infra*.

### STATEMENT OF THE CASE

Petitioner and a male companion were driving a van on the public streets of Weirton, West Virginia, at about 2:30 a.m. on September 7, 1975. (R. 93, 196-197.)<sup>1</sup> As petitioner halted at an intersection for a red light, Officer Gordon, a city policeman, pulled into the lane of traffic directly behind petitioner's van. (R. 92.) Officer Gordon noticed that the license plate on the van in front of him appeared to have no state designation, just the letters BLMO<sup>2</sup> and a series of numbers; the Officer also noticed that one of the van's rear windows was missing. (R. 94, 95, 196, 199-202.)

<sup>1</sup>Page references are to the record as prepared and indexed by the Clerk of the Supreme Court of Appeals of West Virginia.

<sup>2</sup>BLMO, the officer later discovered, is an abbreviation for "Beyond the Limits of Missouri," a special category of vehicle registration for persons who register their vehicles in Missouri but use them elsewhere. The Supreme Court of Appeals of West Virginia noted that this is a "Limited Edition" plate and further that "it is not even arguably a common license plate designation and it completely obscures the state of origin by the inclusion of two extraneous prefix letters." 245 S.E.2d at 626.

Fearing that the license plate in question was "manufactured" or that the vehicle had been stolen<sup>3</sup>, Officer Gordon followed that van approximately four blocks; then he energized the lights on his patrol car in an attempt to stop petitioner's vehicle. (R. 92, 196, 200-201.) Petitioner initially ignored the Officer's signal to stop, and Officer Gordon observed petitioner bent over in the driver's seat. (R. 93-94.) Petitioner finally halted his car approximately five hundred feet from the spot where the patrol car first signaled for him to stop. (R. 93.)

Officer Gordon then requested petitioner's driver's license and registration card. Petitioner replied "that it was with someone else and the van wasn't his." (R. 95-96.) The Officer next requested that petitioner check the glove compartment for the registration card. Petitioner opened the door of the van, stuck his head inside, and stated "there's none in there." (R. 97.) While the two men were thus engaged in a search for the registration card, Officer Kondik, a reserve policeman accompanying Officer Gordon on patrol, informed the Officer that a rifle was lying between the front and back seats of the van.<sup>4</sup> (R. 97.) For his own protection, Officer Gordon proceeded to frisk the petitioner and discovered that he was wearing an empty shoulder holster. (R. 97-98.) Petitioner told Officer Gordon that the "missing" firearm could be found under the van's front seat. As Officer Gordon reached into the van to retrieve the

<sup>3</sup>"Presumably, the offense of driving a stolen car relates to the registration requirement, since a function of registration is to certify ownership." 60 Va. L. Rev. 666 at 687, Fn. 103, *Automobile license checks and the Fourth Amendment* (1974).

<sup>4</sup>"[T]he need to protect police officers conducting [license] checks from possible violence on the part of motorists has made the procedure more elaborate than a mere examination of documents. Typically, one officer will take a position on the right side of the vehicle where he can keep the occupants of the vehicle under surveillance, using a flashlight if necessary. A second officer can then approach the driver's window with less risk of attack." 60 Va. L. Rev. at 672.



weapon, he smelled the odor of marijuana. (R. 98-99.) Officer Gordon promptly obtained a search warrant from Justice of the Peace Thomas Bellanco; a subsequent search of the van recovered approximately 179 pounds of marijuana, a set of scales suitable for weighing marijuana, and ammunition, in addition to the two weapons already retrieved from the vehicle. (R. 102, 103-114.)

Petitioner was indicted at the September, 1975 term of the Circuit Court of Hancock County, West Virginia, for possession with intent to deliver one hundred seventy-nine pounds and three-fourths ounces of marijuana (R. 1). A trial by jury was held on February 9, 1976; petitioner was found guilty and sentenced to a term of not less than one (1) year nor more than five (5) years in the West Virginia Penitentiary. (R. 188-189.) On June 27, 1978, the Supreme Court of Appeals of West Virginia handed down a unanimous decision affirming the judgment of the Circuit Court of Hancock County.

#### REASONS WHY THE WRIT SHOULD BE DENIED

1. *The Supreme Court of Appeals of West Virginia correctly determined that a police officer had a "specific and articulable" reason to stop a motorist driving a vehicle which appeared to have no state designation on its license plate in order to check vehicle registration and driver's license.*

Throughout the body of his petition, petitioner consistently and incorrectly characterizes his initial detention by Officer Gordon as a "pretext" to investigate a motorist engaged in no obvious violation of the State motor vehicle code. However, the thrust of the question presented to the Court below was not petitioner's eventual guilt or innocence of suspected motor vehicle viola-

tions, but whether the police officer in question had "specific and articulable" facts upon which to infer (1) that a possible violation was being committed, and (2) that further investigation was warranted. After considering the unique factual situation presented by the instant action, the Supreme Court of Appeals of West Virginia decided the question, quite correctly, in the affirmative.

A "pretext" stop, as defined in the majority of cases cited by the petitioner, is one in which a police officer can only justify his decision to stop a motor vehicle by pointing to such subjective factors as the apparent nationality of the vehicle's occupants and their erect posture, *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973); the purported nervousness of the vehicle's occupants and the driver's continued surveillance of the pursuing patrol car, *United States v. Carter*, 369 F. Supp. 26 (E.D. Mo. 1974); the excellent condition of a vintage automobile, having no external signs of defective equipment, *State v. Ingle*, 36 N.Y.2d 413, 330 N.E.2d 39 (1975). In each "pretext" situation cited above, the officer's motivation was determined to be one of whim, caprice or idle curiosity because, in each case, the officer was unable to cite tangible factors concerning the vehicle itself which would justify a stop.

Many jurisdictions, such as West Virginia, have held that, absent a random, nondiscriminatory, and preconceived plan, the stopping of motorists to check compliance with state registration and licensing requirements must conform to the standards advanced by this Honorable Court in *Terry v. Ohio*, 392 U. S. 1 (1968):

*"[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with*

*rational inferences from those facts, reasonably warrant that intrusion.* The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: *would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?*" (Emphasis supplied.) 392 U.S. at 21-22.

Moreover, the same jurisdictions, in applying the *Terry* standard, do not require that an actual violation of the State traffic code precipitate the stop:

"It should be emphasized that the factual basis required to support a stop for a 'routine traffic check' is minimal. An actual violation of the Vehicle and Traffic Law need not be detectable. For example, an automobile in a general state of dilapidation might properly arouse suspicion of equipment violations. All that is required is that the stop be not the product of mere whim, caprice, or idle curiosity. It is enough if the stop is based upon 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.' (*Terry v. Ohio*, 392 U. S. 1, 21, 88 S.Ct. 1868, 1880, *supra*)." *State v. Ingle*, 330 N.E.2d at 44.

See also, *Bennett v. State*, 369 N.E.2d 949 (Ind. 1977); *State v. Hall*, 90 N.M. 554, 566 P.2d 103 (1977); *Holder v. State*, 233 S.E.2d 501 (Ga. 1977); and *United States v. Montgomery*, 561 F.2d 875 (D.C. Cir. 1977).

In the instant action, Officer Gordon clearly had more than a "minimal" factual basis upon which to base his initial detention of petitioner's vehicle. Although he was an experienced police officer, he was completely unfamiliar with the vehicle's license plate. (R. 90, 96.) Upon closer examination, he noticed the plate appeared to have no state name. In order to determine if the vehicle were properly registered and licensed,<sup>5</sup> he found it necessary to stop the petitioner. Similar police action has been upheld where a vehicle appeared to have no license plates. *People v. McConnell*, 6 Ill. Dec. 360, 362 N.E.2d 1280 (1977). Also, a stop has been held to be reasonable where an officer observed an "in transit" sticker on a car which also had a current Missouri license plate. Since the sticker was not required to be displayed on a car which had current plates, the officer had reasonable ground to stop the vehicle and require the driver to produce his operator's license. *United States v. Harris*, 528 F.2d 1327 (8th Cir. 1975).<sup>6</sup>

Petitioner's initial detention by Officer Gordon was by no means an "arrest" which would have required "probable cause" under either the Fourth Amendment of the United States Constitution or Article III, Section

<sup>5</sup>Although no actual violation of the State Motor Vehicle Code is necessary to justify a stop, the Court below intimated that a West Virginia resident driving a vehicle titled in his or her name but so registered in Missouri would be in violation of West Virginia Code, 17A-3-2 (1967), appended hereto at App. A, *infra*.

<sup>6</sup>In both *McConnell*, *supra*, and *Harris*, *supra*, as in the majority of jurisdictions in which the initial stop of a motorist has been held to meet the *Terry* standard, a subsequent search of the vehicle and seizure of contraband was also upheld.

6 of the West Virginia Constitution. As outlined above, only "reasonable suspicion," based on specific and articulable facts, is required to justify a momentary stop of a motor vehicle. Where the Court below correctly determined that the officer in question had displayed sufficiently "specific and articulable" reasons for the stop, certiorari should be denied.

2. *The factual situation presented by the instant action is unique and, therefore, not likely to recur.*

Respondent at no time anticipated that the instant action would be used to sanction the stop in West Virginia of any vehicle with out-of-state license plates, nor did the Court below so interpret our argument:

*"While a police officer's casual observation of an out-of-state license plate would not by itself warrant further investigation, the observation of a plate which does not appear to have come from any other state does. Under these circumstances further investigation is not an onerous burden on the motorist, and further investigation is but a reasonable exercise of state power to prevent the use of fraudulent license plates. (Emphasis supplied.) State v. Frisby, 245 S.E.2d 622 at 626.*

Thus, far from constituting the sweeping repudiation of *Terry, supra*, implied by the petitioner, the Court below limited its decision to the unique factual situation in which a police officer is confronted with a "limited edition" license plate from a distant state which appeared to carry no state designation at all. No far-reaching effects can be expected from the Court's decision based, as it was, solely on the exceptional set of facts

presented to it. As the only question raised by petitioner turns on the particular facts of his case, and as any decision rendered on these facts will have little impact outside the limits of the case, certiorari should be denied.

### CONCLUSION

For the foregoing reasons, respondent submits that the Petition for Writ of Certiorari should be denied and that the opinion of the Supreme Court of Appeals of the State of West Virginia should thereby be affirmed.

Respectively submitted,

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### APPENDIX A

West Virginia Code, Chapter 17A, Article 3, Section 2.

"Every motor vehicle, trailer, semitrailer, and pole trailer when driven or moved upon a highway shall be subject to the registration and certificate of title provisions of this chapter except:

(1) Any such vehicle driven or moved upon a highway in conformance with the provisions of this chapter relating to manufacturers, transporters, dealers, lienholders, or nonresidents or under a temporary registration permit issued by the department as hereinafter authorized;

(2) Any implement of husbandry upon which is securely attached a machine for spraying fruit trees and plants of the owner or lessee or for any other implement of husbandry which is used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any other purpose other than for the purpose of operating it across a highway or along a highway other than an expressway as designated by the state road commissioner from one point of the owner's land to another part thereof, irrespective of whether or not the tracts adjoin: Provided, that the distance between the points shall not exceed fifteen miles, or for the purpose of taking it or other fixtures thereto attached, to and from a repair shop for repairs. The foregoing exemption from registration and license requirements shall also apply to any vehicle hereinbefore described or to any farm trailer owned by the owner or lessee of the farm on which such trailer is used, when such trailer is used by the owner thereof for the purpose of moving farm produce and livestock from such farm along a public highway for a distance not to exceed

ten miles to a storage house or packing plant, when such use is a seasonal operation.

The exemptions contained in this section shall also apply to farm machinery and tractors: Provided further, that such machinery and tractors may use the highways in going from one tract of land to another tract of land regardless of whether such land be owned by the same or different persons.

Any vehicle exempted hereunder from the requirements of annual registration certificate and license plates and fees therefor shall not be permitted to use the highways as above provided between sunset and sunrise.

Any vehicle used as an implement of husbandry exempt hereunder must have the words "farm use" affixed to both sides of the implement in ten-inch letters;

(3) Any vehicle which is propelled exclusively by electric power obtained from overhead trolley wires though not operated upon rails;

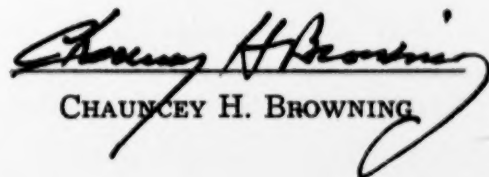
(4) Any vehicle of a type subject to registration owned by the government of the United States;

(5) Any wrecked or disabled vehicle which is being towed by a licensed wrecker or dealer on the public highways of this State. (1951, c. 129; 1967, cc. 112, 113.)



**CERTIFICATE OF SERVICE.**

I, Chauncey H. Browning, one of counsel for the respondent and a member of the Bar of the Supreme Court of the United States hereby certify that, on the 22 day of December, 1978, I served three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari on the petitioner by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the respondent Leo Catsonis, Catsonis and Linkous, 205 Security Building, Charleston, West Virginia 25301. I further certify that all parties required to be served have been served.

  
CHAUNCEY H. BROWNING